

**A Leighton Contractors (M) Sdn Bhd v Gnanapragasam a/l
 Arukiam & Ors**

**B HIGH COURT (PENANG) — CIVIL APPEAL NO 16–10–12 OF 2015
 COLLIN SEQUERAH JC
 9 AUGUST 2016**

**C *Labour Law — Wages — Overtime wages — Respondents employed by
 appellant as train assistant — Respondents worked for nine hours but paid only for
 eight hours — Respondents lodged complaint to Director General of Labour and
 claimed overtime payment — Whether respondents employees within definition of
 the Employment Act 1955 — Whether respondents engaged in manual labour***
D — *Employment Act 1955*

The respondents lodged a complaint to the Director General of Labour that they were paid to work as a ‘shunter/train assistant’ for eight hours and made to work for nine hours by their employer (‘the appellant’). Accordingly, the respondents claimed for overtime payment under s 60A(3) of the Employment Act 1955 (‘the Act’). The Director General of Labour held that the respondents were employees within the definition of the first schedule of the Act and therefore entitled to a claim of overtime payment. Being dissatisfied with the decision, the appellant filed the present appeal. The issues for court’s decision were: (a) whether the respondents were employees within the definition of the First Schedule of the Act, thus entitling them to overtime claims; and (b) whether the respondents engaged in manual labour as provided under sub-s 2(1) of the First Schedule of the Act.

G Held, dismissing the appeal with costs:

(1) Notwithstanding that the respondents had to exercise some judgment when indicating the signals to move or stop to the train assistant, or the fact that they were required to communicate with the train driver during shunting movements, the substantial or dominant purpose of their work was spent engaged in manual work, a large portion of which involved shunting movements. Such works could not be reasonably classified as anything other than manual labour. The findings of the Director General of Labour involved findings of fact in the main. It is trite that these findings of fact ought not to be lightly disturbed. The court decided that there was no good reason for the court to disturbed such findings (see paras 23–24 & 27).

[Bahasa Malaysia summary]

Responden-responden membuat aduan kepada Ketua Pengarah Buruh bahawa mereka dibayar untuk bekerja sebagai 'shunter/train assistant' untuk lapan jam dan bekerja untuk sembilan jam oleh majikan mereka ('perayu'). Berikutan itu, responden-responden menuntut bagi bayaran bekerja lebih masa di bawah s 60A(3) Akta Pekerjaan 1955 ('Akta'). Ketua Pengarah Buruh memutuskan bahawa responden-responden adalah pekerja-pekerja dalam definisi Jadual Pertama Akta dan oleh itu berhak menuntut bayaran bekerja lebih masa. Tidak berpuas hati dengan keputusan, perayu memfailkan rayuan ini. Isu-isu untuk keputusan mahkamah adalah: (a) sama ada responden-responden adalah pekerja-pekerja dalam definisi Jadual Pertama Akta, dengan itu memberikan hak kepada mereka untuk tuntutan bekerja lebih masa; dan (b) sama ada responden-responden diambil bekerja dalam kerja kasar seperti yang diperuntukkan di bawah sub-s 2(1) Jadual Pertama Akta.

Diputuskan, menolak rayuan dengan kos:

- (1) Meskipun responden-responden perlu membuat keputusan apabila menunjukkan isyarat untuk bergerak atau berhenti kepada pembantu keretapi, atau fakta mereka dikehendaki untuk berhubung dengan pemandu keretapi semasa pergerakan memirau, substansial atau tujuan dominasi kerja mereka dihabiskan dengan terlibat dalam kerja kasar, sebahagian besar daripadanya melibatkan pergerakan memirau. Kerja-kerja sedemikian tidak boleh secara munasabah diklasifikasikan sebagai apa-apa kecuali kerja kasar. Dapatan Ketua Pengarah Buruh melibatkan terutamanya dapatan fakta. Adalah nyata bahawa dapatan fakta ini tidak patut dicampur tangan dengan melulu. Mahkamah memutuskan bahawa tidak terdapat alasan baik bagi mahkamah untuk campur tangan dengan dapatan sedemikian (lihat perenggan 23–24 & 27).]

Notes

For a case on overtime wages, see 8(2) *Mallal's Digest* (5th Ed, 2015) para 2116.

Cases referred to

Colgate Palmolive (M) Sdn Bhd v Cheong Foo Weng & 12 Ors (and Another Appeal) [2001] MLJU 719; [2002] 2 AMR 2107, HC (refd)

Legislation referred to

Employment Act 1955 ss 2, 2(1), 60A(3), 69, Schedule 1

Navit Kaur Randhawa (Zarith Satina bt Md Sani with her) (Asbir, Hira Singh & Co) for the appellant.

Palaniappan all M Ramasamy (Palani & Co) for the respondent.

A Collin Sequerah JC:

INTRODUCTION

B [1] This is an appeal by the appellant against the decision of the Director General of Labour given on 26 November 2015 which held that the respondent's abovenamed were employees within the definition of Schedule 1 of the Employment Act 1955 (Act 265) ('the Act') and therefore entitled to a claim of overtime pursuant to s 60A(3) and brought under s 69 of the Act in the aggregate sum of RM41,717.90 together with penalty for late payment and interests.

BRIEF FACTS AND CONTENTIONS OF PARTIES

D [2] The three respondent's were employed by the appellant as 'shunter/train assistant' for the construction of the Northern Double Track Ipoh to Padang Besar Project.

E [3] The respondent's lodged a complaint to the Director General of Labour that all three of them were paid for eight hours work but made to work for nine hours. Their claim was for overtime payment under s 60A(3) of the Employment Act 1955. They also submitted that a colleague of theirs, namely Peraisamy a/l Apavoo who was also employed as a 'shunter/train assistant' was paid overtime.

F [4] The appellant in response relied upon cl 4 of the respondent's letters of appointment which read as follows:

WORKING HOURS

G Working hours are from 8am to 6pm, Monday to Saturday with a one hour lunch break. Normal working hours shall be as per requirements at the respective sites and may vary depending on the Project's operational requirements. The Company reserves the right to change the schedule of working hours according to Project requirements and the employee shall be informed accordingly.

H You will be expected to work additional hours as and when necessary to facilitate the performance of your duties. *Your monthly salary is inclusive of payment of any additional hours worked and no additional payment will be made for overtime.* (Emphasis added.)

I [5] The appellant therefore contends that the respondent's are contractually bound by these terms. The appellant also submitted that as the monthly salaries of the respondent's inclusive of fixed monthly allowances at the commencement of their employment was RM2,500 each (in excess of RM2,000), they do not fall under the ambit of the Act and therefore are not entitled to claim for overtime under s 60A(3) of the Act.

[6] Alternatively, the appellant submits that as the nature of the respondent's work do not entail that they are engaged in manual labour or if they are employed partly in manual labour and partly in some other capacity, the time during which they are required to perform manual labour in any one wage period does not exceed one-half of the total time during which they are required to work in such wage period, they do not fall under the First Schedule of the Act and therefore out of its coverage.

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[7] The appellant further submitted that the payment made to the said Peraisamy a/l Apavoo was done by mistake.

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[8] The respondent's on the other hand contended that as they are classified as manual labourers under the First Schedule of the Act, although their monthly salaries exceed RM2,000, they are entitled to overtime claims under the said Act.

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FINDINGS AND DECISION

[9] The pivotal issue in this appeal is whether the respondent's are employees within the definition of the First Schedule of the Employment Act 1955, thus entitling them to overtime claims.

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[10] In the Employment Act 1955, s 2 defines 'employee' as follows:

means any person or class of persons —

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- (a) *included in any category in the First Schedule to the extent specified therein;* or
- (b) in respect of whom the Minister makes an order under sub-section(3) or section 2a;

The categories of persons in the First Schedule who qualify as 'employees' are as follows:

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First Schedule

[Sub-section 2(1)]

2 Any person who, *irrespective of the amount of wages he earns in a month*, has entered into a contract of service with an employer in pursuance of which —

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(1) he is *engaged in manual labour* including such labour as an artisan or apprentice:

Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period; (Emphasis added.)

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A [11] It is not in dispute that the respondent's were all earning more than the statutory threshold of RM2,000 per month. Therefore prima facie they do not fall under the purview and protection of the Employment Act 1955 unless they can bring themselves within s 2(1) of the First Schedule ie that they are engaged in manual labour or fall within the deeming proviso to the said sub-section.

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C [12] On the particular facts of the case therefore, the question is whether, the respondent's are 'engaged in manual labour' or are employed partly in manual labour or partly in some other capacity 'performing manual labour where the time during which they are required to perform such manual labour in any one wage period exceeds one-half of the total time during which they are required to work in such wage period', in which case they will be deemed to be engaged in manual labour. If they are successful in proving this, then they are rightfully entitled to their claim of overtime payments under s 60A(3) of the said Act.

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[13] In *Colgate Palmolive (M) Sdn Bhd v Cheong Foo Weng & 12 Ors (and Another Appeal)* [2001] MLJU 719; [2002] 2 AMR 2107, the meaning of the term 'manual labour' was defined as follows:

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'Manual labour' involves physical exertion as opposed to mental/intellectual effort. Thus it is not manual labour if 'the real labour involved is labour of the brain and intelligence'. Whilst all manual labour would entail some manual work, it cannot be readily assumed that the person performing the manual work is a manual labourer and further it cannot also be accepted that the person is in law 'engaged in manual labour'. *The test to determine whether or not a person is 'engaged in manual labour' is: 'what is the substantial/dominant purpose of the employment, to the exclusion of the matters which are incidental or accessory to the employment'*. It is therefore essential to determine whether the work in question is purely physical in nature, as opposed to work which has a physical/manual content but which is really dependent upon acquired skill, knowledge or experience. (Emphasis added.)

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H [14] Although there was no evidence of their job description in order to describe their duties as shunter/train assistants, from the evidence adduced at the Labour Court, the nature of work performed included displaying signals (flags) to the train drivers, train marshalling, separating the train coaches and reducing the number of coaches known as shunting movement, vacuum pipe with bare hands, pulling lever and tumber point, fixing vacuum pack and connecting the coaches, assembling coach or arranging coach lots, operating level point, attaching and dissecting vacuum poch, checking all brakes and releasing brakes, detaching and reattaching coaches, round the engine from front to the back, loading and unloading ballast and following the train from Sungai Petani to Padang Besar or from Bukit Mertajam to Padang Besar.

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[15] The respondent's were also required to work for ten hours per day with a one hour break which meant that they were working for nine hours per day but were paid for only eight hours work, hence their claim for overtime payment. A

[16] There was also evidence that the time taken for each tasks varies, with shunting movements by itself taking about one to one and a half hours with the frequency ranging from four to five times per day. B

[17] A consideration of the duties of the respondent's as enumerated above, when viewed as a whole, makes it quite clear that the general nature of their employment is physical in nature. The respondent's do not perform any desk jobs nor were any tables or offices assigned to them. They do not perform any work using paper, pen or stationary and neither does their work involve the use of computers. C D

[18] The policy behind the said phrase 'engaged in manual labour', as stated in the *Colgate Palmolive* case, is to protect employees who are engaged in purely physical work devoid of mental application for more than half (50%) of the entire wage period but earn a salary in excess of RM2,000. It was also held in that decision that the definition ought to exclude such manual work that was considered incidental or temporal in nature. E

[19] While this may be so, it is not to be taken to mean that segments of the work performed can be viewed and considered in isolation in determining whether the work amounts to 'being engaged in manual labour'. This was exactly what the appellant was attempting to do when they submitted that the time taken for certain portions of the respondent's duties, for example, giving signals to the train drivers would only take about five minutes and that the time spent 'following the train' while awaiting arrival cannot be considered as time spent being 'engaged in manual labour'. F G

[20] I agree with the submission of learned counsel for the respondent's that the act of sitting in the train while awaiting it to arrive at its destination cannot be construed as a deliberate act of idleness but was rather that of being put on standby while awaiting further instructions which constituted part of their work function. H

[21] According to the definition in the *Colgate Palmolive* case, although any manner of work that is incidental or temporal in nature were clearly to be excluded from such consideration, the nature of the work performed must be viewed as a whole and not in isolated segments or compartments. I

[22] The necessity of the respondent's in exercising their judgement when

- A indicating the signals to move or stop to the train assistant, or the fact that they would need to communicate with the train driver during shunting movements does not take the work performed out of the scope of 'being engaged in manual labour'. No form of work can be altogether taken to be mindless. Even an iron smith must exercise some reasonable skill and exercise of judgement in the
- B forging of articles of iron. No one would readily dispute that he is engaged in manual labour.

- [23] Notwithstanding that the respondent's had to exercise some judgement
- C when indicating the signals to move or stop to the train assistant, or the fact that they were required to communicate with the train driver during shunting movements, the substantial or dominant purpose of their work was spent engaged in manual work, a large portion of which involved shunting movements (where coaches were detached, rearranged, reduced and
- D reattached) which took about one to one and a half hours with the frequency ranging from four to five times per day.

- [24] Such work cannot be reasonably classified as anything other than
- E manual labour. No paperwork was involved and neither did such work require any exercise of an intellectual nature. It was purely mechanical and physical in nature.

- [25] The contradictions between the witnesses for the appellant's in respect
- F of the exact scope of the respondent's work did not further the appellant's cause. While SD2 testified that shunters were not involved in manual labour, SD1 said that shunters were involved in shunting movement which involves separating, rearranging or reducing the number of coaches.

- [26] With respect to the contention of the appellant that one other person
- G who was involved in 'shuntering', namely, Periasamy a/l A Appavoo was paid overtime by mistake, I agree with the respondent's that as this was only raised during the trial and there was no evidence of any action taken to recover the sum, that it amounted to a mere afterthought on the part of the appellant.

- H [27] The findings of the Director General of Labour involved findings of fact in the main. It is trite that these findings of fact ought not to be lightly disturbed. I see no good reason for so doing here. I therefore dismissed this
- I appeal with costs.

Appeal dismissed with costs.

Reported by Dzulkarnain Ab Fatar